SUPREME COURT, U. S.

Nos. 797, 804, 808, and 809

APR 13

In the Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN COMMERCIAL LINES, INC., ET AL., APPELLANTS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

THE AMERICAN WATERWAYS OPERATORS, INC., APPELLANT

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (A. 12–32) is reported at 268 F. Supp. 71. The report of Division 2

of the Interstate Commerce Commission (A. 35–59) and the report of the entire Commission upon reconsideration (A. 60–80) appear at 323 I.C.C. 758 and 326 I.C.C. 77, respectively.

JURISDICTION

The judgment of the district court (A. 32–33) was entered May 15, 1967. Notices of appeal were filed on July 12, 13 and 14, 1967. Probable jurisdiction was noted on January 15, 1968 (389 U.S. 1032). The jurisdiction of this Court to review the judgment below on direct appeal rests upon 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

STATUTES INVOLVED

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3) provides:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

The National Transportation Policy (49 U.S.C., preceding sections 1, 301, 901, and 1001) reads as follows:

> It is hereby declared to be the national trans-

portation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

QUESTION PRESENTED

Whether the Interstate Commerce Commission erroneously held that an undue impairment of the inherent advantage of a combined barge-truck service over a competing rail service had been adequately shown by comparing the fully distributed costs of the competing modes of transportation.

STATEMENT

Since 1953 the movement of ingot molds from Neville Island and Pittsburgh, Pennsylvania, to Steel-

ton, Kentucky, has been principally by combination barge-truck service, and since 1960 the overall charge has been $5.11 per ton. In 1965 the Pennsylvania Railroad and the Louisville & Nashville Railroad met the barge-truck rate by reducing their rate for transportation over the route from $11.86 to $5.11 per ton. On protest by the barge lines, joined by intervening truck interests, that the rail rate was unlawful under Section 15a(3) of the Interstate Commerce Act (49 U.S.C. 15a(3)) because it impaired or destroyed the inherent cost advantage of the barge-truck service, the Interstate Commerce Commission undertook an investigation (see A. 36–37, 61).

In the administrative proceedings which followed, the railroads presented economic evidence to show that inherent advantage should be determined by comparison of each mode of transportation's out-of-pocket costs, *i.e.*, the incremental cost incurred for carrying the particular traffic. The barge-truck interests urged that it should be determined by comparing each mode's fully distributed costs. Division 2 of the Commission found comparative cost levels (on a per-ton basis) for the two modes as follows (A. 53–59):

Rail out-of-pocket costs	468.9 cents
Rail fully-distributed costs	759.4 cents
Barge costs (including the charge to shippers for transfer and trucking services)	519.6 cents

The railroads' out-of-pocket cost was computed by application of a formula developed by the Commission's Cost Section utilizing reported operating data of each railroad for 1962 (A. 44–59). The formula includes all expenses traceable to providing the service over an intermediate long-range period, including

80 percent of total operating expenses, rents and taxes, and an allowance for return after income taxes at four percent on one-half of the depreciated investment in equipment.[1]

The rail fully-distributed cost was determined by adding to the out-of-pocket cost an allocated portion of the railroads' constant expenses, *i.e.*, those not related to particular units of service. These include costs related to bridges, rights-of-way, and excess roadway, which must be maintained regardless of traffic volume. In addition, they include railroad passenger and less-than-carload deficits.

The barge-truck fully-distributed cost was based upon figures in various reports plus the barge-to-truck transfer charge and the for-hire truck charge (App. 50–51).[2]

Division 2 of the Commission held that inherent cost advantage must be determined by a comparison of fully-distributed costs. It found, therefore, that the barge-truck service had the inherent cost advantage, but concluded that the railroads' rate reduction did not unduly impair it. In its view the reduced rate simply matched the barge-truck rate of $5.11—itself below the barge-truck fully-distributed cost of $5.19—and it concluded that under Section 15a(3) the barge-truck service could continue to compete effectively

[1] Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs., I.C.C. Cost Section Statement No. 7–63, p. 3 (1963).

[2] The Commission indicated no precise amount for barge-truck out-of-pocket cost but found that this figure was greater than railroad out-of-pocket cost (A. 71).

and still charge a rate above its out-of-pocket cost (A. 42–43).

The railroads petitioned the full Commission for reconsideration of the Division 2's determination that fully-distributed costs were the standard for determining an inherent cost advantage. The barge carriers petitioned from the Division's finding that their inherent advantage was not unduly impaired by the reduced rail rate.

The full Commission, three members dissenting, held that the rail rate unduly impaired the barge-truck mode's inherent advantage because it was lower than the barge-truck fully-distributed cost. The Commission noted that its recent practice had been to determine inherent advantage on the basis of fully-distributed costs. It rejected the railroads' economic evidence supporting an out-of-pocket cost standard on the ground that a carrier's ability to handle traffic at rates below fully-distributed cost does not necessarily mean that it is more efficient than its competitors. It also held that to depart from the fully-distributed-cost standard would not be justified, on the limited record before it, particularly since similar issues were pending before it in another proceeding (A. 60–80).

In a suit brought by the railroads, in which the United States, a statutory defendant, supported their position, a three-judge district court unanimously set aside the Commission's order (A. 32–33). In a detailed opinion it reviewed the record, analyzed this Court's opinion construing Section 15a(3) in *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, and considered the legislative history of

Section 15a(3) and the National Transportation Policy. It held that the Commission's decision lacked any rational basis; and that on this record the Commission's determination was inconsistent with the objectives and purposes of Congress in enacting Section 15a(3) (A. 12–32). It remanded the matter to the Commission for further action not inconsistent with its opinion (A. 32–33).

SUMMARY OF ARGUMENT

In Section 15a(3) of the Interstate Commerce Act Congress provided that "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy * * *." Under Section 15a(3), whose history and purpose were comprehensively reviewed in *Interstate Commerce Comm'n* v. *New York N. H. & H. R. Co.*, 372 U.S. 744, a carrier may normally reduce its rates to any level compensatory in terms of its own revenue requirements, whatever the resulting diversion of traffic from competing modes. Only if the competing modes show that their inherent cost and service advantages will be unduly impaired or destroyed is this presumption rebutted. Thus, Section 15a(3) guards against preventing a carrier from asserting its inherent advantage just as it guards against the undue impairment or destruction of another mode's inherent advantage.

In the instant case, the Commission ignored these principles in concluding that the barge-truck mode had the inherent advantage over the railroads because

the latter had the highest fully-distributed cost. It gave no adequate explanation for using comparisons of fully-distributed costs as the standard for this fundamental determination. Expert testimony reflecting reputable economic thought indicated that a comparison of fully-distributed costs can never describe inherent advantage accurately, since unlike factors wholly unrelated to the traffic are necessarily involved in such figures. In contrast, utilization of out-of-pocket costs, which allocate the carriage of particular traffic to whichever mode can move it at the least additional cost, permits the market to determine inherent advantage on the basis of direct cost to the user and comparative service advantages.

Not only did the Commission fail to furnish any grounds for reqecting this testimony; it gave no sound justification for its reliance on a fully-distributed cost standard. It stated only that low out-of-pocket costs are not necessarily an indication of efficiency, that fully-distributed costs had been used in prior cases, and that in view of another pending proceeding it would not consider the matter presently. This constituted a wholly inadequate performance of the Commission's duty under *New Haven*. The Commission's apparent motive for rejecting out-of-pocket pricing was simply to protect the competing barge lines from vigorous rail competition for the traffic. This, however, is contrary to Congress's purpose in enacting Section 15a(3), as reflected in its legislative history and in *New Haven*.

The Commission's effort to furnish in this Court the rationale lacking in its decision below infringes

the principles of *Burlington Truck Lines* v. *United States*, 371 U.S. 156, and *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194. Moreover, the premise of that rationale—that barge lines always have the inherent advantage because unlike railroads they incur no right-of-way costs—begs the question, would leave nothing for the Commission to do, would render Section 15a(3) meaningless, and would be wholly inconsistent with the *New Haven* case. As thus construed, Congress's purpose in enacting Section 15a(3) and the National Transportation Policy would be frustrated, for instead of creating vigorous intermodal competition, as Congress intended, it would leave the Commission with *carte blanche* to engage in intermodal protectionism.

ARGUMENT

THE COMMISSION ERRED IN CONCLUDING THAT AN UNDUE IMPAIRMENT OF THE INHERENT ADVANTAGE OF THE BARGE-TRUCK MODE HAD ADEQUATELY BEEN SHOWN THROUGH COMPARING THE FULLY-DISTRIBUTED COSTS OF THE COMPETING MODES

1. Ten years ago Congress added Section 15a(3) to the provisions in Part I of the Interstate Commerce Act governing railroad rate making. It provides that in proceedings involving intermodal competition, "the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable." More pertinently, the statute prescribes that "[r]ates of a carrier shall not be held up to a particular level to protect the traffic of any other mode

of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." The National Transportation Policy, adopted in the Transportation Act of 1940 (54 Stat. 899), directs the Commission to administer the Act so as to recognize, promote or encourage certain specified economic considerations to the end of achieving a national transportation system adequate to meet the nation's postal, commercial and defense needs. One of these considerations is that the Commission is "to recognize and preserve the inherent advantages of each [mode regulated under the Act]."

In *Interstate Commerce Comm'n* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744 ("the *New Haven* case"), this Court comprehensively reviewed the history and purposes of Section 15a(3) and the significance of its reference to the National Transportation Policy. It held that under Section 15a(3) reduced rates of a railroad which exceed its out-of-pocket cost but are lower than the fully distributed cost of a competing mode are lawful even if they take some or all of the traffic involved from the competing mode, *unless* the Commission (1) finds that the competing mode has the overall inherent advantage, considering comparative costs and service efficiencies, and (2) further finds that this inherent advantage would be unduly impaired or destroyed by the reduced rates. Once a carrier has established that the proposed rate is just and reasonable from the standpoint of its own revenue requirements, the burden is on the protesting carrier claiming injury to its inherent cost advantage to show that it has the overall advantage and that this ad-

vantage would be unduly impaired (*id.* at 760, 761). Noting that concepts of fully-distributed and out-of-pocket costs might prove unsatisfactory criteria in an intermodal context and that "some different measure" might be necessary, the Court further held that it was for the Commission initially to determine how to measure inherent advantage and the appropriate method of protecting it (*ibid.*).

Thus, *New Haven* made clear, as the court below held, that under Section 15a(3) a carrier should normally be free to reduce its rates to any level compensatory in terms of its own revenue requirements, whatever the resulting diversion of traffic from competing modes. Only if the competing mode shows that its inherent cost and service advantages will be unduly impaired or destroyed is this presumption rebutted.

New Haven also makes clear that inherent advantage under Section 15a(3) and the National Transportation Policy is a two-way street. It guards against intermodal protectionism which would require any carrier to maintain rates at levels which would protect competing modes from loss of traffic and thus prevent it from asserting its inherent advantage, just as much as it guards against the undue impairment or destruction of a mode's inherent advantage. As this Court, after reviewing the legislative history of Section 15a(3), pointed out, "Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode," but rather "made it clear that something more than even hard competition

must be shown before a particular rate can be deemed unfair or destructive" (372 U.S. at 759). The Act requires that "due consideration", not controlling weight, be given to the objectives of the National Transportation Policy. And the legislative history makes clear that all competing modes, including railroads, are entitled to assert their inherent cost advantage (see 372 U.S. at 755).

2. Implicit in *New Haven* is the assumption that before striking down a rate for impairing a competing mode's inherent advantage, the Commission will make findings specifically directed to the criteria it has adopted for defining inherent advantage and an analysis that articulates a reasoned basis for selecting those criteria. Yet, although the Commission recognized that in the instant case it was determining the fundamental standard for measuring and protecting inherent advantage (A. 65), it wholly failed to furnish a satisfactory explanation for its action.

The Commission computed the rail out-of-pocket cost (468.9 cents), rail fully-distributed cost (759.4 cents) and undifferentiated barge cost (519.6 cents) on the basis of cost studies derived from official reports by the carriers to the Commission (A. 38). But it never analyzed these studies for the purpose of determining whether their component elements were suitable for intermodal comparisons. It found that the barge lines had the inherent advantage because their fully-distributed cost is lower than the rail fully-distributed cost (A. 71). But it did not explain why the barge-truck costs indicated greater economic efficiency. It pointed out that as between regulated

and unregulated carriers, it had consistently permitted comparative out-of-pocket pricing (A. 67). But it did not indicate why this criterion was inappropriate as between regulated rail and water carriers. It noted the substantial economic arguments advanced by the railroads to show that fully-distributed costs were an inappropriate and inadequate measure of inherent cost advantage (A. 66–67). But it gave no other explanation for rejecting these arguments than to state "merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic woud make to its overhead, does not necessarily mean that the carrier is the more efficient of the two" (A. 67–68).

Similarly, the Commission made no finding as to relative efficiency. It gave no consideration to the comparative service advantages the two competing modes offered to shippers, and made no attempt to assess the overall inherent advantage in terms of both cost and service. It found that the barge-truck lines could not compete effectively even though they had not been undercut, because the railroads might subsequently attempt further reductions, then raise the rate after the barge competition had been destroyed (A. 71). But it ignored its authority to bar such predatory action under 49 U.S.C. 4(2), which is specifically aimed at this practice.[3] It did not con-

[3] 49 U.S.C. 4(2) provides: "Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates

sider the fact that the railroads had simply matched the barge-truck rate, thus offering shippers a choice of two alternate modes at the same cost, in which service advantages would be the decisive factor. And although its prior decisions did not explain its rationale for using the fully-distributed-cost standard,[4] it stated that it would not depart from them on this record even though it contained comprehensive economic testimony. Its only reason was that more extensive testimony was being offered in a pending rulemaking proceeding (A. 70).

The Commission's opinion thus left unanswered questions crucial to its finding of inherent advantage: why one mode was inherently more efficient than the other; in the light of all relevant factors, why the elements used to determine comparative fully-distributed and out-of-pocket costs were appropriate for intermodal comparison;[5] and, most important of all, why fully-distributed rather than out-of-pocket costs or some other measure was the best test of inherent cost advantage.

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on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

[4] *Grain in Multiple-Car Shipments—River Crossings to the South*, 325 I.C.C. 752, 772; *Pig Iron, Buffalo, N.Y. to Chicago, Ill., and Gary, Ind.*, 321 I.C.C. 121, 129–130; *Electric Cable & Wire, Worcester, Mass., to Houston, Tex.*, 319 I.C.C. 390; *Plastics from Texas to the East*, 319 I.C.C. 379; *Frozen Juice and Fruit from Florida to the North*, 319 I.C.C. 577; and *Candy and Confectionery from N.J., N.Y., & Pa. to Tex.*, 321 I.C.C. 154.

[5] Fully-distributed costs were determined by adding to the rail out-of-pocket costs an allocated portion of the railroad's

This determination, as the Commission itself recognized, went to the fundamental issue before it (A. 65). Since the statute gives no express guidance as to the appropriate criterion, it was incumbent upon the Commission to consider all substantial economic evidence submitted to it and to explain why one viewpoint should prevail over another. The testimony supporting use of an out-of-pocket cost standard, advanced by four distinguished economists (A. 81–160), merited specific analysis. It indicated that fully-distributed costs can never measure inherent advantage accurately. To begin with, demand for transportation service is elastic. No price formula on particular traffic can guarantee recovery of all constant and fixed costs assigned to that unit. Because the total revenues generated depend on volume multiplied by price, higher prices usually will result in less volume and therefore higher fixed costs per unit. Moreover, the concept of fully-distributed costs and the related concept of profit is a matter of accounting practice, not economic

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constant expenses. There are an infinite number of ways of allocating constant costs to arrive at fully-distributed costs (A. 93), depending on the method used; differences here between rail and barge-truck fully distributed costs range from 239.8 cents to 28.8 cents (A. 38–39). Included in the constant expenses of the railroads were deficits arising from their carriage of passengers and less-than-carload traffic. Passenger traffic is ordinarily deficit service and has no bearing on relative efficiency in providing freight service. The Commission never explained why in comparing the inherent advantages of each mode here it included in fully-distributed rail costs such expenses even though the barge-truck mode does not provide passenger service.

superiority. There are a variety of ways of computing full costs, depending on what items and how much of them are to be allocated as constant expenses to particular traffic (see note 5, *supra*).

Comparison of fully-distributed costs also distorts inherent advantage because it compares unlike factors not necessarily related to efficiency in carrying particular traffic. Thus, rail overhead here included items for services the barge-truck lines do not provide—the railroads' passenger and less-than-carload deficits. Moreover, the full-cost concept disregards the fact that most constant costs have already been expended. Bridges, rights-of-way, excess trackage and excess capacity represent costs which, like the costs of the highways and waterways, have already been paid, and they must be borne by the carrier or the public whether or not the facilities are used to carry parular traffic. Thus, as long as a carrier of any mode can cover its out-of-pocket costs and earn something towards defraying part of its fixed costs, the economy as a whole benefits and the burden on other parts of the carrier's traffic to contribute to constant costs is reduced.

Out-of-pocket costs thus allocate the carriage of particular traffic to whichever mode can move it at the least additional or incremental cost. They therefore represent a determination of inherent advantage by the market for that traffic, and take account not only of costs but of comparative service advantages. To achieve competition and the optimum allocation of transportation costs, therefore, comparative incremental costs for particular traffic represent the most

economically sound method of determining inherent advantage and thus the best means of achieving the ends sought by the National Transportation Policy.

These views, which were presented at length to the Commission, are supported not only by the substantial body of economic thought expressed by the witnesses, but by the Council of Economic Advisers and the Department of Commerce (see Economic Report to the President 1966, p. 127; Department of Commerce, Federal Transportation Policy and Program, Appendix 37).[6] Yet they were brushed aside without even the benefit of a critical analysis or a comparative weighing against the view which prevailed.

3. In its brief in this Court the Commission attempts to supply the analysis which the agency itself failed to provide in its opinion. As an initial matter, this seems at best a questionable practice, in light of this Court's admonition that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action * * *." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168–169; see also *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 196; *National Labor Relations Board* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438, 442–444. In any event, the position now espoused by the Commission is unsound. What the Commission in substance argues (although it did not so find) is that water carriers *always* have an inherent cost advantage because, un-

[6] Similarly, the Department of Transportation strongly supports the view of the district court "that the Commission failed to take adequate account of the Congressional intent that carriers should normally be free to offer rates which are compensatory, *i.e.*, above relevant out-of-pocket costs" (A. 31).

like railroads, they incur no right-of-way costs. Then, citing *Grain in Multiple-Car Shipments—River Crossings to the South*, 321 I.C.C. 582, 325 I.C.C. 752, which it contends was incorporated by reference into its opinion, the Commission asserts that the *Grain* case recognize this inherent advantage. But the only reference to the *Grain* case in the Commission's opinion was a quotation to the effect that fully-distributed costs have generally been employed by the Commission in determining inherent cost advantage. Moreover, the *Grain* case simply held, in accordance with the purposes of the National Transportation Policy, that the Commission would not prevent water carriers from asserting their inherent advantages by requiring them to *raise* their rates at the demand of the railroads. It did not hold or indicate that rail rates should be held up to the barges' cost levels or that such action was necessary to protect the barges' inherent advantage from undue impairment or destruction.

In addition, the premise of the Commission's argument—that water carriers always have the inherent cost advantage—begs the very question that body must initially resolve. Even though water and motor carriers incur no right-of-way costs, it does not follow that in determining inherent advantage for ratemaking purposes the Commission is to weigh the right-of-way costs of the railroads against them. As we have indicated, if incremental costs for carrying particular traffic are the standard, then it is the railroads which have the inherent advantage on the carriage of the particular traffic here involved. Obviously, if the

barge carriers always have the inherent advantage under the National Transportation Policy, then there has never been anything for the Commission to resolve, the *New Haven* case was erroneously decided, and Congress accomplished nothing when it added Section 15a(3) to the Act in 1958.

Finally, the Commission argues that out-of-pocket costs were rejected as the basis for determining inherent advantage because the traffic involved is important to the competing barge lines and would be reduced or lost if the reduced rail rate was allowed. We agree, as did the district court (A. 24, 25), that this appears to be the primary motivation for the Commission's decision. But, as the Court said in *New Haven* (372 U.S. at 759): "If there is one fact that stands out in bold relief in the legislative history of §15a(3), it is that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode." If a mode's "need" for traffic is the criterion for determining inherent advantage, then the Commission has *carte blanche* to engage in the kind of protectionism which Congress has consistently opposed ever since the Interstate Commerce Act was extended to intermodal competition. This would turn Congress's purpose in Section 15a(3) and the Transportation Act of 1940 upside down.

The National Transportation Policy derived from and superseded Section 202(a) of the Motor Carrier Act of 1935. (49 Stat. 543, repealed, 54 Stat. 920).

When truckers came under Commission regulation, Section 202(a) was adopted to prevent the agency from keeping motor carrier rates at high levels in order to protect the railroads (79 Cong. Rec. 5650 (remarks of Senator Wheeler, the floor manager)). Congress, therefore, directed the Commission in Section 202(a) to recognize and preserve the inherent advantage of motor carriers by permitting them to assert that advantage through low rates. When water carriers were brought under Commission regulation in 1940, their fear that their rates would be forced up to railroad levels led Congress to incorporate the same inherent advantage language into the National Transportation Policy (84 Cong. Rec. 6126–6128 (remarks of Senator Wheeler)). During the debates on the 1940 Act, Congress expressly rejected proposals which would have required use of a fully-distributed cost standard.[7]

The Commission itself recognized in 1945 that the purpose of the National Transportation Policy was to permit vigorous intermodal competition at compensatory rate levels. *New Automobiles in Interstate Com-*

[7] During the debates both the House and the Senate adopted a provision (the Miller-Wadsworth Amendment) which would have required the Commission to consider "overhead and all other elements entering into the cost to the carrier * * * for the services rendered" (84 Cong. Rec. 6074, 9962, 9977). It was eliminated in conference, however (H. Rep. No. 2832, 76th Cong. 3d Sess., pp. 87–89, 86 Cong. Rec. 10172), and, although vigorously debated, was not restored (86 Cong. Rec. 10193–10194, 11766–11767). Various similar proposals also failed of passage. See H.R. 2531, 76th Cong., 1st Sess., Sec. 41; Hearings on S. 1310 and S. 2016, S. 1869 and S. 2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., p. 698.

merce, 259 I.C.C. 475. Section 15a(3) was adopted, as this Court recognized in *New Haven* (372 U.S. at 756–758), primarily because the Commission had departed from the *New Automobiles* decision. The Commission's attempt to use this history in support of its action in this case is inconsistent with the legislative background and with this Court's construction of the congressional purpose in *New Haven.*

In sum, the Commission's present approach amounts to a return to the faults Section 15a(3) was intended to correct. The district court accurately perceived this. Its holding that the Commission's decision here is inconsistent with the purposes of Section 15a (3) does not, contrary to the Commission's contention, impair the agency's initial responsibility to determine inherent advantage. It simply recognizes that without a sound basis for such a determination, a decision holding up the rates of one mode to protect another achieves precisely the result Congress sought to avoid.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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